

Overtime law and white-collar workers

“Time and a Half’s the American Way”: A History of the Exclusion of White-Collar Workers from Overtime Regulation, 1868–2004. By Marc Linder, Fanpihua Press, Iowa City, Iowa, 2004, 1,342 pp., \$20/paperback.

In intricate yet luminously flowing sentences reminiscent at times of Marcel Proust, and with a fervent sense of justice rivaling that of Charles Dickens, Marc Linder has written a definitive study of a critical provision of federal labor law whose enormous impact deprives over 30 million employees of the right to minimum wage as well as time and one-half overtime pay for any work in excess of 40 hours in a workweek. The provision, a part of the Fair Labor Standards Act (FLSA) administered and enforced by the U.S. Department of Labor (DOL), says merely that the minimum wage and overtime provisions shall not apply to “any employee employed in a bona fide executive, administrative, or professional capacity . . .” What is most astounding about this provision, as Linder makes clear, is that there is no indication in any of the Congressional debates or committee reports on the FLSA that offers any clue what Congress intended in enacting this so-called white-collar exemption (even though Congress directed DOL to issue regulations defining the scope of the exemption).

As part of what he calls “terminological prolegomena,” Linder notes the rich irony of calling this provision an exemption rather than an exclusion. In common parlance under the FLSA a professional economist, for example, would be described as “entitled to the exemption”—thus suggesting that it is the employee who derives some benefit as a result. But quite

to the contrary, since an exemption is relief from a requirement or liability, it is the employer who enjoys the benefit by being excused from paying minimum wage and overtime pay. It would hence be more accurate to say that the employee is excluded from the FLSA’s protections. Linder, a law professor at the University of Iowa and arguably the country’s pre-eminent authority on the FLSA, has written a very lengthy book that puts the white-collar exemption in its full historical context. He examines various bills passed (or at least debated) before the enactment of the FLSA in 1938 that carved out exceptions for white-collar workers; he explores the treatment of white-collar workers in the federal government; he reviews the laws of foreign countries on the subject; and, most importantly, he analyzes in great detail the various regulations that DOL issued between 1938 and 2004 that try to clarify the meaning of this provision. Linder’s prodigious learning and indefatigable pursuit of facts, including numerous interviews and archival research, represent a stunning intellectual achievement.

A detailed analysis of the various DOL regulations implementing the FLSA exemption is the heart of the book, culminating in over a hundred pages that describe the gestation and birth of the latest regulatory changes in 2004. These 2004 revisions were so controversial that Congress, for the first time in the nearly 70-year history of the FLSA, sought—unsuccessfully, as it turned out—to prevent them from coming into force.

In looking at legislation before the FLSA was enacted, Linder seeks some understanding of what Congress may have had in mind in creating the FLSA’s white-collar exemption. This examination includes, most importantly, state minimum wage and overtime laws and the National Industrial

Recovery Act of 1933 (NIRA), as well as various alien contract labor immigration laws and even several treaties—International Labor Organization conventions—relating to hours of work. These earlier white-collar exclusions unfortunately offer few if any clues. The numerous National Recovery Administration (NRA) codes of fair competition under the NIRA are a prime example. These codes—in effect, regulations fleshing out the NIRA—restricted working hours in various industries in order to encourage the hiring of the unemployed during the Great Depression. But the restrictions in the codes had various exceptions, such as permitting extra hours during peak periods of work and excluding certain white-collar employees completely from the hours limitations. After an extensive analysis of the many NRA hearings on fair competition codes for various industries, Linder finds little consistency in the white-collar exclusion rules that were adopted. As he notes, few unions were trying to organize white-collar workers when the codes were being developed, and indeed unions at that time often regarded office workers as potential spies for management. As a result, white-collar workers—even clerical workers, many of whom were unemployed—had few advocates for limited hours. The NRA codes accordingly offer almost no guidance that would illuminate the meaning of the FLSA’s white-collar exemption. Thus, when DOL set out in 1938 to issue FLSA regulations fleshing out the meaning of “executive,” “administrative,” and “professional” employee, it truly had a *tabula rasa*.

The purposes of the minimum wage and overtime pay provisions are explained in the FLSA’s legislative history, and for this reason—so Linder asserts—they offer some indication of how Congress must have intended

to limit the scope of the white-collar exemption. Minimum wages are intended to assure tolerable compensation for workers; overtime pay is intended to put pressure on employers to hire more workers rather than requiring those already on the payroll to work over 40 hours per week. One approach to fulfilling these purposes, even in the face of a provision that excludes white-collar workers from the FLSA's protections, is to limit the scope of the exemption to only those executive, administrative, and professional job categories in which unemployment is very low. To use a simple example, if many mid-level executives in the automobile industry are laid off, then the exemption should arguably not apply to them because otherwise the auto industry would be under no "time and one-half" financial pressure to discourage it from forcing the mid-level executives still on the payroll to work even longer hours. Linder gives various other examples of how the regulations defining the scope of the exemption could be crafted, taking into account the basic purposes of the FLSA's standard wage requirement. These suggestions, however, seem to overlook the fact that many exemptions in the FLSA, though claimed to have various and elaborate rationales, at bottom have little more purpose than to save an employer some money without any regard to the adverse effect of the exemption on affected employees. In any event, DOL did not adopt this approach that Linder discusses.

The original white-collar regulations, issued in October 1938, generated so much interest that they were printed in full on the front page of *The New York Times*. They contained a two-part test for exempt status. First, there was a description of various duties that defined who was exempt, distinguishing white-collar employees from clerical employees,

technicians, and working foremen and others. (In the original regulations the definitions of executive and administrative employee were the same, because DOL regarded administrative employees as administrators or managers and thus essentially synonymous with executive employees.) Second, the regulations established a minimal salary of \$30 per week. The rationale for this requirement was that compensation is the best indicator of the importance of an employee to an employer and that white-collar employees are overwhelmingly paid on a salary basis. (*The minimal-salary requirement did not apply to professional employees.*) Professional employees were required for the first time in 1940 to be paid a specified minimal compensation on a salary or fee basis, but this test did not apply to lawyers or doctors.

This two-part "duties test/salary test" for exempt status has remained, in broadest outline, more or less the same since 1938. Two important regulatory changes to the salary test have occurred since then. In 1940, a second, higher-level salary was established, and employees who were paid at the higher level had fewer specified duties they had to perform in order to be exempt. The theory underlying this short test of duties, commonly called just the short test, was that employees who are paid a higher salary are more likely to be exempt and hence have fewer duties requirements. The 1940 regulations set the short test salary minimum at \$100, whereas the salary for the long test of duties (the "long test" salary) was \$55 for executive and administrative employees and \$75 for professional employees. At irregular intervals from 1940 until 2004 the salaries were adjusted upward, in order to reflect rising salaries for white-collar employees; but the duties tests remained essentially the same.

The other important regulatory change occurred in 2004, when both the salary test and the duties tests were revamped. The long test salary was set at \$455 per week (the equivalent of \$11.38 per hour for a 40-hour week and \$23,660 per year). The short test salary required that the employee be paid at least \$100,000 per year (\$1,923 per week, of which at least \$455 per week had to be paid on a salary or fee basis). The rest could be paid by commissions or other non-discretionary compensation. And for both the long test and the short test the list of duties that had to be performed was shortened. Specifically, duties required under the long test for the executive exemption were reduced from 5 to 3, for the administrative exemption from 4 to 2, and for the professional exemption from 4 to 1. As for the short test duties, they were reduced from 2 to 1 (except for professional employees engaged in artistic or similarly creative or imaginative work, who even under the pre-2004 short test had to meet only 1 duty requirement).

The effect of the 2004 regulatory changes deeply troubles Linder for many reasons. He contends that the \$455 per week salary under the long test is far too low. If all of the long test salaries established in the past are adjusted for inflation using the consumer price index, the current \$455 per week is the lowest salary in nearly 50 years. As he points out, the weekly salary minimums for the long test established in 1959—\$100 for executive and administrative employees and \$115 for professional employees—in 2004 are the equivalent of \$614 and \$707, respectively, when adjusted for inflation.

Linder also believes that the revisions of the duties under the long test will make more employees exempt. A graphic example is that, before 2004, the long test required that in order

to be exempt an executive employee could not spend more than 20 percent of working time doing non-executive work (or 40 percent in the case of an employee of a retail or service establishment); a similar 20 percent limit applied to an administrative employee. (These so-called tolerances for nonexempt work recognized the fact that even executives might have to spend some time doing their own photocopying, filing, and other less exalted work.) These requirements were significantly relaxed under the long test in the 2004 regulations so that there is now a 50 percent tolerance for nonexempt work.

It remains to be seen whether the 2004 regulatory changes will have the many adverse effects on employees that Linder foresees. The new regulations have been in effect for only three years so there are not yet enough court decisions to make a definitive judgment. Nevertheless, there is little doubt that the regulations, mainly because of the reduction in the number of duties tests, will make it easier than in the past for employers to claim successfully that their white-collar employees satisfy the duties tests.

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The credit trap

Debt for Sale. By Brett Williams, University of Pennsylvania Press, Philadelphia, Pennsylvania, 2004, 131 pp., \$19.95/paperback.

Brett Williams, a professor of Anthropology at American University, has done extensive research of the credit industry. In this book she analyzes the marked changes that have taken place in the lives of Americans

since credit cards first began making a major impact in the 1970s. She makes an impressive case against banks and finance service companies, who, she says, pursue profits in high-interest credit cards; student loans; and “predatory lending” or marketing to the poor, less educated, more vulnerable in society. The result, she says, has been “the fall of the middle class, the strangling of small business, the exploitation of college students and the battering of the poor.”

Indebtedness among Americans is proliferating. According to Professor Williams, between 1980 and 1990 the amount of our indebtedness more than doubled, from \$300 billion to \$795 billion. In 1995, issuers of credit cards sent out 2.4 billion unsolicited credit offers and collected \$65 billion in interest, more than the GNP of Egypt. By 2003, personal debt had grown to 130 percent of disposable income, nearly one-third more than was the case in 1995. Simultaneously, some Americans have become less and less able to pay their bills, as service jobs replaced higher paying manufacturing jobs.

In the 1980s, credit card interest and fees became the primary profit source for banks. According to Williams, the banks initially sought middle class “installment users,” people who “intend to pay their bills each month but never quite manage,” flooding them with a barrage of enticements. Once that market became saturated, banks focused on college and high school students and the poor. Since the 1990s, Williams claims that credit card solicitors have specifically targeted college students with ads such as “Visa: accepted at more places than you were.” The bait is a low introductory interest rate, but once it expires even the “preferred” interest rate is much higher. When you are late, bounce a check, or go over your limit there are penalties, and any time

you don’t pay off the balance in full, you pay interest on interest. A 1991 survey found that only 18 percent of students paid off their balances each month. By 1995, for every 100,000 college students, credit card issuers earned more than \$16.5 million a year; of this, \$10 million was interest. The next group that may be heavily targeted for credit cards could be high school students. “Within five years, your typical 15-year old will have at least a \$300 credit limit on a major card,” was the prediction of one analyst cited by Williams.

Concurrently, Williams explains, finance service companies began marketing credit cards to the poor and uneducated. One method of doing this is the payday loan. This is how it works: in return for \$100, a customer writes a check for \$130 to be cashed when the customer gets paid a week or two later. The loan shop typically earns an annual interest rate of more than 1,200 percent on such loans. By 1999, there were an estimated 8,000 payday loan shops. The number of pawn shops, where interest rates approximate 200 percent, doubled during the 1980s; nationwide, there were around 14,000 shops by 2002. Other methods of offering high-cost credit to the poor include rent-to-own stores, where customers may pay 5 times the retail price, and income tax anticipation loans that can charge interest exceeding 700 percent on an annualized basis.

So, what can be done? Williams offers a number of solutions including:

1. Raise the reserve requirements for banks engaging in predatory lending.
2. Tax short-term gains and give credit for long-term holdings to encourage the creation of jobs that pay a living wage.
3. Create a nationwide usury cap on all types of lending and enforce it.

4. Loan money directly to students rather than through banks and intermediaries, offer amnesty on student loans in return for public service, and consider making a college education the type of entitlement it is in many European countries.

5. Require banks to provide low-cost banking services to the poor.

Brett Williams is “right on the money,” both in her analysis of the problem and the solutions that she suggests above. But, to be fair, it should also be noted that Williams barely touches upon the benefit credit cards provide to responsible users. Does anyone really want to go back to the days when traveling required carrying large sums of

money and/or traveler’s checks?

To those interested in purchasing this book she offers some good advice: “Don’t Charge This Book!”

—Jim Titkemeyer

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